(2)

No. 08-1285

In The

Supreme Court of the United States

LAZAR S. FINKER, RAISSA M. FRENKEL, STEVEN CHARLES KOEGLER, WILLIAM E. CHATTIN, THEODOROS J. KAVALIEROS, and AFRODITI KAVALIEROS,

Petitioners,

v.

GALINA WEBER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

LAWRENCE J. HAMILTON II
Counsel of Record
DANIEL K. BEAN
ANDREW STEIF
HOLLAND & KNIGHT LLP
50 N. Laura Street, Suite 3900
Jacksonville, Florida 32202
Telephone: (904) 353-2000

Counsel for Respondent, Galina Weber

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

RESTATEMENT OF QUESTIONS PRESENTED

Respondent Galina Weber ("Weber") respectfully submits that Petitioners' Questions Presented incorrectly exaggerate the relevance of The Treaty Between the United States of America and the Swiss Confederation on Mutual Assistance in Criminal Matters ("U.S.-Switzerland MLAT") to the instant dispute. As an initial matter, the issues cited in the Petition for Writ of Certiorari ("Petition") are effectively moot as the United States District Court for the Middle District of Florida ("District Court") and United States Court of Appeals for the Eleventh Circuit ("Eleventh Circuit") held that Respondent Weber was entitled to the *same* discovery in a Cyprus civil case as she was awarded in the Swiss criminal case at issue in the Petition. Moreover, the Petitioners failed to cite a single case that supports their argument that: 1) the U.S.-Switzerland MLAT and Title 28 U.S.C. Section 1782 ("Section 1782") are inconsistent; or 2) the U.S.-Switzerland MLAT somehow controls the outcome of this dispute. Respondent Weber was legally entitled to bring her discovery requests under Section 1782, which expressly provides for the application of the Federal Rules of Civil Procedure, and the U.S.-Switzerland MLAT does not control the outcome of this dispute. Accordingly, the questions presented should be restated as follows:

RESTATEMENT OF QUESTIONS PRESENTED – Continued

1. Whether the Petition should be denied as effectively moot as the District Court and Eleventh Circuit held that Respondent Weber was entitled to the same discovery in a Cyprus civil case as she was awarded in the Swiss criminal case at issue in the Petition;

2. Whether the Eleventh Circuit properly concluded that Respondent Galina Weber was neither required to bring her request for judicial assistance under the U.S.-Switzerland MLAT nor satisfy the requirements thereof; and

3. Whether the Eleventh Circuit properly concluded that Respondent Galina Weber properly brought her request for judicial assistance under Section 1782, which expressly states that the discovery will be produced in accordance with the Federal Rules of Civil Procedure.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Rules of the Supreme Court of the United States, Respondent Galina Weber is an individual and accordingly there is no parent or publicly held company involvement.

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STATEMENT OF THE CASE

As affirmed by the Eleventh Circuit, the District Court did not abuse its discretion in determining that Respondent Weber is entitled to the discovery she seeks pursuant to Section 1782. The appellate and district court correctly applied both Section 1782 and this Court's decision in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 124 S.Ct. 2466, 159 L.Ed.2d 355 (2004), and properly refused to apply the U.S.-Switzerland MLAT. The Petitioners entirely fail to address the fact that Respondent Weber sought discovery for use in two foreign proceedings, a Cypriot civil action and Swiss criminal action. The District Court, as affirmed by the Eleventh Circuit, awarded Respondent Weber the same discovery contested by the Petitioners in the Swiss criminal action, for the Cypriot civil action. Petitioners' Appendix ("Pet. App.") 18-37. Therefore, any ruling made by this Court would be effectively advisory in nature as regardless of the outcome of Petitioners' U.S.-Switzerland MLAT arguments, Respondent Weber was entitled to, and has received, the same documents in the Cypriot civil action and Petitioners did not appeal that aspect of the ruling.

Moreover, as to the Swiss criminal action, the Petitioners make their erroneous legal arguments without citing any legal support and by mistakenly referring to the 1996 Amendment to Section 1782 as a "clarification" rather than what it truly was – an amendment enacted by the United States Congress

and as it was expressly recognized by this Court in its *Intel* decision.

With other unsupported legal arguments scattered throughout the Petition, there is no doubt that the Petitioners failed to present a compelling reason for this Court to grant their Petition and it should be denied.

Respondent Weber is a citizen of Switzerland and a resident of the Principality of Monaco. Pet. App. 2. She is a shareholder of Itera Group, Ltd., a Cypriot corporation ("Itera Group"). Petitioners are also each shareholders of Itera Group. *Id.*

Respondent Weber filed suit in the District Court of Limassol, Cyprus against Defendants: 1) Itera Group; 2) Igor V. Makarov ("Makarov");[1] and 3) Sweet Water Intervest Corporation of the British Virgin Islands, (a private company controlled by Makarov) (hereinafter the "Cypriot Action"). The Cypriot Action was instituted because the Cypriot defendants conspired to improperly dilute Respondent Weber's ownership interest in Itera Group. Pet. App. 3.

Subsequent to the commencement of the Cypriot Action, criminal charges were filed by Gasitera Suisse A.G., an Itera Group subsidiary, against Respondent Weber in Switzerland for allegedly embezzling Itera

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[1] Makarov was one of the original parties in the district court proceeding; however, Makarov was dismissed without prejudice in the Amended Petition. Pet. App. 18.

Group assets ("Swiss Action"). Her husband Urs Weber and brother-in-law Silvio Weber, both of whom were former Gasitera Suisse directors, were also named defendants. Pet. App. 3-4; 18-19. These Swiss allegations were based primarily on accusations and information provided by Makarov and Itera Group officials. Respondent Weber has cooperated with the criminal investigation and participated in the discovery process in both the Cypriot and Swiss Actions.

In order to aid her in both the Cypriot and Swiss Actions, Respondent Weber also required discovery from the Petitioners, whom were located in and around Jacksonville, Florida. Pet. App. 18. None of the Petitioners are named parties to either the Cypriot or Swiss Actions. Pursuant to Section 1782, Respondent Weber filed a Petition for Discovery in Aid of Foreign Proceedings on April 27, 2007. Pet. App. 4. As determined by both the lower courts, Respondent Weber satisfied the federal statutory requirements for seeking discovery in aid of foreign proceedings. Pet. App. 4-5. Specifically, Respondent Weber is an interested person in certain Swiss criminal and Cypriot civil proceedings, and she requires evidence in the possession or control of individuals residing in the Middle District of Florida in order to succeed in both foreign proceedings. Pet. App. 49-56.

In response, Petitioners have done all within their power to delay and thwart the timely receipt of

discovery by Respondent Weber.[2] As to the non-criminal Cypriot Action, which is effectively ignored in the Petition, the District Court found that each of Respondent Weber's eight requests for production were also relevant to the Cypriot Action. Pet. App. 18-37. Respondent Weber sought documents directly related to her specific claim in the Cypriot Action of improper dilution through the issuance of 6,000,000 new capital shares of Itera Group stock. Pet. App. 19. There is no dispute that Section 1782 and the Federal Rules of Civil Procedure apply to the Cypriot Action, an issue not even raised, much less contested, by Petitioners. The fact that the District Court awarded equivalent discovery in the Cypriot Action renders the Petition moot and merely advisory in nature. None of the arguments raised in the Petition apply to the Cypriot Action, as that aspect of the District Court's and the Eleventh Circuit's rulings have not been appealed, rendering this case an improper vehicle by which to address the meritless U.S.-Switzerland MLAT arguments raised by Petitioners.

The Petitioners have also incorrectly argued that the U.S.-Switzerland MLAT governs the request for discovery in the Swiss Action, along with the Federal

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[2] In fact, Petitioners' improper attempts to delay caused the District Court, during a Show Cause Hearing on October 27, 2008, to state the following: "[I]n my view, when I look at this, it has every aspect of people who just don't want to produce documents, no matter what." *See* Respondents' Appendix ("Resp. App.") 3.

Rules of Criminal Procedure; however, case law and the clear language of Section 1782 enable Respondent Weber to elect to proceed under Section 1782 and make clear that the Federal Rules of Civil Procedure govern those procedures. Petitioners conveniently ignore that Article 38 of the U.S.-Switzerland MLAT expressly states that "[A]ssistance and procedures provided by this Treaty shall be without prejudice to, and shall not prevent or restrict, any available under any other international convention or arrangement or under the municipal laws in the Contracting States." Pet. App. 108-109.

In the Swiss Action, the basket in which Petitioners theoretically place all their eggs, Respondent Weber is a defendant in a Swiss criminal action for allegedly embezzling Itera Group assets. Pet. App. 46. Pursuant to Swiss law, indebtedness is a complete defense to embezzlement. *Id.* The documents requested by Respondent Weber under Section 1782 directly impact the claims in the Swiss Action and Respondent Weber's defense of indebtedness as well as her claims in the Cypriot Action. Pet. App. 18-37.

Additionally, as to the Swiss Action, despite Petitioners' contentions to the contrary, legal authority exists holding that: 1) Section 1782 and the U.S.-Switzerland MLAT are consistent: 2) an interested person – there is no distinction between the criminal or civil context – may pursue discovery under Section 1782; 3) the documents shall be produced in accordance with the Federal Rules of Civil Procedure unless the district court prescribes otherwise; and

4) a Congressionally enacted amendment to a federal statute is an amendment – not a clarification.

Accordingly, the Eleventh Circuit and the District Court correctly resolved this case in favor of Respondent Weber, and the Petition should be denied.

SUMMARY OF THE ARGUMENT

The Petition is without merit. It does not present a compelling reason to grant certiorari. The District Court, as affirmed by the Eleventh Circuit, held that Respondent Weber was entitled to discovery as to each of her eight requests for production for use in the Cypriot Action. Petitioners fail to address this issue in the Petition and the effect of the lower court's ruling as to the Cypriot Action renders this case effectively moot and a particularly poor vehicle by which to argue for the application of the U.S.-Switzerland MLAT. In effect, even if Petitioners were entitled to a reversal of the Eleventh Circuit's holding regarding the Swiss Action, which they are not, the discovery awarded to Respondent Weber for the Cypriot Action is entirely unaffected. Effectively then, Petitioners seek an advisory legal ruling from the Court as to the theoretical effect of the U.S.-Switzerland MLAT, which is not a proper function of this Court's certiorari review.

Moreover, as to the Swiss Action, Petitioners have not established that the Eleventh Circuit: 1) entered a decision that was in conflict with the decision of

another United States court of appeals on the same important matter; 2) decided an important question of federal law that has not been, but should be, settled by this Court; or 3) decided an important federal question in a way that conflicts with relevant decisions of this Court. Instead the Petition: 1) erroneously attempts to apply the requirements of the U.S.-Switzerland MLAT to the facts of this case; 2) incorrectly avers the Eleventh Circuit failed to follow this Court's decision in *Intel*, *supra*; and 3) improperly attempts to change a Congressional amendment into a "clarification" so as to avoid the legal ramifications thereof.

As to the first point regarding the Swiss Action, the Petitioners completely ignore the fact that the Eleventh Circuit correctly found that: 1) "a plain reading of the treaty indicates that the MLAT is designed to facilitate discovery between States Parties [the United States and Switzerland];" and 2) the U.S.-Switzerland MLAT is silent as to its applicability to private citizens. Accordingly the entire foundation upon which the Petition is built – the mandatory application of the requirements of the U.S.-Switzerland MLAT – is fatally unsound.

After finding that the U.S.-Switzerland MLAT and Section 1782 were consistent with one another, the Eleventh Circuit also correctly found that Section 1782 "would still be the appropriate vehicle for Weber's discovery request under the last in time rule" even if, for argument's sake, Section 1782 and the U.S.-Switzerland MLAT were inconsistent. Pet. App. 8; *Whitney v. Robertson*, 124 U.S. 190, 194, 8 S.Ct.

456, 458, 31 L.Ed. 386 (1888); *see also Valencia v. United States AG,* 176 Fed.Appx. 979, 984, 2006 WL 1049411 (11th Cir. Apr. 20, 2006); *Guevara v. United States AG,* 132 Fed.Appx. 314, 319, 2005 WL 1220646 (11th Cir. May 24, 2005). The Eleventh Circuit correctly noted that Section 1782 was amended in 1996 and that the U.S.-Switzerland MLAT went into effect on January 23, 1977. Pet. App. 8. Accordingly, Section 1782 controls because it is last in time.

As to the *Intel* decision, the Eleventh Circuit meticulously followed the leading published decision on Section 1782 and did not deviate from it as Petitioners wrongfully allege. Specifically, the Eleventh Circuit cited *Intel* as follows: 1) private parties may seek discovery for use in a foreign proceeding through Section 1782; 2) discovery under Section 1782 is not limited to discovery that would be allowed under United States law in domestic litigation analogous to the foreign proceeding; and 3) the 1996 Amendment to Section 1782, which inserted the words "including criminal investigations conducted before formal accusation," signaled Congress' intent to further facilitate discovery by individuals for use in foreign criminal actions and underscores that Section 1782, as applied, is consistent with the U.S.-Switzerland MLAT and permissible under Article 38 of that same Treaty.

For all of the aforementioned reasons, the decisions below are neither questionable nor controversial

and certainly do not warrant further review by this Court.

REASONS FOR DENYING THE WRIT

For the reasons discussed *infra*, Petitioners have presented no compelling reasons for this Court to grant their Petition in that the discovery awarded to Respondent Weber for use in the Cypriot Action renders the issues raised in the Petition effectively moot and advisory in nature. Moreover, Petitioners fail to point to where the Eleventh Circuit: 1) entered a decision in conflict with the decision of another United States court of appeals on the same important matter; 2) decided an important question of federal law that has not been, but should be, settled by this Court; or 3) decided an important federal question in a way that conflicts with relevant decisions of this Court. *See* Sup. Ct. R. 10.

I. The Discovery Awarded to Respondent in the Civil Cypriot Action Renders the Issues Raised in the Petition Effectively Moot and this Case is an Improper Vehicle to Address the Arguments Raised in the Petition for Certiorari

The District Court, as affirmed by the Eleventh Circuit, properly held that the documents in question

in this case are independently discoverable in connection with the Cypriot Action. Pet. App. 18-37.

The Petitioners do not possess, and cannot raise, any argument that Section 1782 does not apply to the discovery sought by Respondent Weber for use in the Cypriot action. Rather, Petitioners have steadfastly ignored this crucial aspect of the lower courts' rulings and have chosen to base their Petition solely on the Swiss Action. The Cypriot aspect of the ruling below, having not been challenged, is final. This fault is fatal to the Petition.

Nowhere in the Petition do Petitioners acknowledge the crucial fact that the District Court applied the relevancy standard of Rule 26, Federal Rules of Civil Procedure, to the Section 1782 inquiry for the Cypriot Action, and made well reasoned decisions in granting discovery as to each of the eight requests for production served on Petitioners. Pet. App. 18-37.

Instead, in the Petition, Petitioners have asserted several meritless arguments, each related to their contention that the U.S.-Switzerland MLAT, and therefore, the Federal Rules of Criminal Procedure, should apply to the *Swiss Action*. Petitioners have not contended, nor can they, that a MLAT Treaty between the United States and Switzerland for use in criminal matters, somehow applies to a civil case filed by Respondent in Cyprus. Therefore, Section 1782 uncontrovertibly applies to the Cypriot Action.

Even if Petitioners were able to gain certiorari review and an eventual reversal as to the District

Court and Eleventh Circuit's rulings in the Swiss Action, there would be no effect whatsoever on the discovery awarded to Respondent for the Cypriot Action. The Petition is effectively moot and asks this Court to provide Petitioners with an advisory opinion as to the effect of the U.S.-Switzerland MLAT on discovery which is duplicated by that awarded for the Cypriot Action. Therefore, despite Petitioners' claims to the contrary, this case is not ripe for review. Even if Petitioners' arguments as to the Swiss Action had merit, which they do not, this case does not present the proper opportunity for this Court to decide the effect of the U.S.-Switzerland MLAT. Therefore, on the basis of the Cypriot Action rulings alone, this Court should deny the Petition.

II. The Respondent Properly Chose to Proceed in Accordance with Section 1782 and Therefore the U.S.-Switzerland MLAT is Not Relevant to this Dispute

The Eleventh Circuit properly found that Respondent Weber was not required to bring her discovery request under the U.S.-Switzerland MLAT. Pet. App. 7-9. The Eleventh Circuit opined that the U.S.-Switzerland MLAT provides for discovery between the Contracting Parties [the United States and Switzerland] and contrasted it with the language in Section 1782 that provides the means by which "any interested person" may seek discovery. Pet. App. 7-8. While the Eleventh Circuit expressly declined to hold that no private party could ever seek redress

under the U.S.-Switzerland MLAT, facilitated by their State Party, the Eleventh Circuit held that "a plain reading of the treaty indicates that the MLAT is designed to facilitate discovery between States Parties" and not private parties such as Respondent Weber. *Id.* Furthermore, the Eleventh Circuit correctly cited this Court's *Intel* opinion for the purpose of establishing that private parties may seek discovery for use in a foreign proceeding pursuant to Section 1782. *Id.*

Furthermore, Petitioners also ignore that Section 1782 places the discretion of whether discovery should be granted with the district court. *See Intel*, 542 U.S. at 255-59 (2004). The application of the Federal Rules of Civil Procedure only becomes relevant after the district court exercises its discretion to permit discovery to take place. Pet. App. 11 (citing *In re Clerici*, 481 F.3d 1324, 1336 (11th Cir. 2007) (holding that "*once discovery is authorized* under § 1782, the federal discovery rules, *Fed. R. Civ. P. 26-36*, contain the relevant practices and procedures. . . .") (emphasis added). Accordingly, Petitioners' argument that the Federal Rules of Criminal Procedure, if applied, would prevent the disclosure of discovery, is simply incorrect.

III. The U.S.-Switzerland MLAT is Not Inconsistent with Section 1782 and Therefore Section 1782 is Controlling

The Eleventh Circuit, like the other courts that have previously addressed this issue, correctly determined that the U.S.-Switzerland MLAT was consistent with Section 1782. Pet. App. 8; *see In re Request from the Swiss Fed. Dep't of Justice & Police*, 731 F.Supp. 490, 491 (S.D. Fla. 1990) (holding that a court must read relevant statutes as consistent with the U.S.-Switzerland MLAT if at all possible); *In re Request from L. Kasper-Ansermet, Examining Magistrate for the Republic & Canton of Geneva, etc.*, 132 F.R.D. 622, 628 (D.N.J. 1990) (noting that even under the U.S.-Switzerland MLAT, there is ample authority for using civil subpoenas to compel deposition testimony pursuant to Section 1782). In analyzing Section 1782 and the U.S.-Switzerland MLAT, the Eleventh Circuit found the latter permits the two States Parties to seek discovery assistance from each other whereas Section 1782 permits any interested person to apply to a federal court for discovery assistance. Pet. App. 7-9. The Eleventh Circuit also noted that the U.S.-Switzerland MLAT was silent on its applicability to discovery requests by non-States Parties. *Id.*

Moreover, Petitioners neglect to mention that Article 38 of the U.S.-Switzerland MLAT itself

provides that the United States may make available alternative and less restrictive mechanisms that may permit expanded discovery. Pet. App. 108-109. The U.S.-Switzerland MLAT established a minimum level of cooperation between the Contracting States, but Article 38 left open the possibility and permissibility of either State affording itself greater discovery. Section 1782, which provides for the possibility of broader discovery to parties seeking documents for foreign proceedings, is such a mechanism. Accordingly, the Eleventh Circuit correctly determined that Section 1782 and the U.S.-Switzerland MLAT were consistent with one another. Pet. App. 7.

Lastly, as to this point, accepting Petitioners' argument that the U.S.-Switzerland MLAT requirements should be enforced in foreign criminal proceedings would completely eviscerate the Congressional intent of Section 1782. Moreover, Petitioners' argument flies in the face of the expressed terms of the aforementioned Article 38.

IV. The Eleventh Circuit Properly Applied this Court's *Intel* Decision

The Eleventh Circuit's decision in this case was completely congruent with this Court's decision in *Intel*, *supra*, which remains this Court's most recent pronouncement on Section 1782.

This Court in *Intel* thoroughly analyzed over 150 years of congressional efforts to provide federal-court assistance in gathering evidence for use in foreign

tribunals. 542 U.S. at 247. The Court's review of the history of this effort illustrated Congress' consistent steps to broaden the ability of interested persons to gain access to discovery. *Id.* at 247-49. This Court specifically wrote that Congress "further *amended* § 1782 to add, after the reference to 'foreign or international tribunal,' the words 'including criminal investigations conducted before formal accusation.'" *Id.* at 249 (emphasis added). This 1996 Amendment is significant to this case because it further broadened the ability of criminal defendants to access discovery, but it is also nearly identical to the current circumstances of Respondent Weber in that she finds herself defending a criminal investigation that has not yet resulted in a formal charge being brought.

Moreover, Petitioners ignore the fact that *Intel* made clear the use of Section 1782 to gather evidence is appropriate even when the discovery in question might not be permitted in the underlying foreign country, thus negating any reasonable argument that the procedure of a treaty must be followed. *Id.* at 253. This is further evidence that Section 1782 should be interpreted to grant, not limit or prohibit, discovery.

Petitioners assert that the requested discovery should have been denied because it would not have been available in a criminal case in the United States. Respondent Weber denies that such a statement is either accurate or germane and points out that *Intel* rejected the suggestion that a Section 1782 applicant must show that United States law would allow discovery in domestic litigation analogous to the foreign

proceeding. *Id.* at 263. This Court specifically held that Section 1782 "does not direct United States Courts to engage in comparative analysis to determine whether analogous proceedings exist here. Comparisons of that order can be fraught with danger." *Id.*

Finally, the Eleventh Circuit's decision also correctly followed Section 1782, *Intel* and other applicable case law in holding that the Federal Rules of Civil Procedure applied in this case.[3] Pet. App. 9-11; *Application of Sumar*, 123 F.R.D. 467, 469-70 (S.D.N.Y. 1988) (declining to apply the criminal rules even where the foreign proceeding was criminal in nature); *Bayer AG v. Betachem Inc.*, 173 F.3d 188 (3d Cir. 1999) (under ordinary circumstances, the Federal Rules of Civil Procedure apply when discovery is sought pursuant to Section 1782); *see also In re Request from L. Kasper-Ansermet, Examining Magistrate for the Republic & Canton of Geneva, etc.*, 132 F.R.D. 622, 628 (D.N.J. 1990) (holding that Federal Rules of Civil Procedure applied); *In re Application Pursuant to 28 U.S.C. Section 1782 for an Order Permitting Christen Sveaas to Take Discovery from Dominique Levy, L & M Galleries and other non-participants for use in Actions Pending in the Norway,*

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[3] The Petitioners' unsupported argument that the discovery would not be available if the Federal Rules of Criminal Procedure are applied is irrelevant inasmuch as Article 38 of the U.S.-Switzerland MLAT allows the United States to permit broader discovery.

249 F.R.D. 96, 106 (S.D.N.Y. 2008) ("The proper scope of the discovery sought under Section 1782, like all federal discovery, is governed by Federal Rule 26(b)").

The holdings in these cases were based on the following clear statutory mandate in Section 1782, affording discretion (which was not abused below) to decide whether the civil or criminal rules of procedure would be applied:

> The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

28 U.S.C. § 1782 (2008). In this case, the District Court, as affirmed by the Eleventh Circuit, affirmatively held that the Federal Rules of Civil Procedure were to apply. There can be no doubt that pursuant to Section 1782, this Court's decision in *Intel*, and other applicable case law, the Federal Rules of Civil Procedure apply to Respondent's discovery requests as to the Swiss Action.

Clearly the Eleventh Circuit's decision meticulously followed this Court's *Intel* decision.[4]

V. Congress Enacted an Amendment – Not a Clarification – of Section 1782 in 1996 and Therefore Even if Section 1782 Were Inconsistent with the U.S.-Switzerland MLAT, Section 1782 Controls Under the "Last in Time" Rule

In addition to alleging that the Eleventh Circuit failed to properly follow this Court's *Intel* decision, the Petitioners incredulously argue that the Eleventh Circuit also failed to recognize this Court's determination in *Intel* that the 1996 Amendment of Section 1782 was a simple clarification. Pet. 11-12. This Court made no such finding. Specifically, the Petitioners alleged that "[w]ithout explanation, the Eleventh Circuit rejected this straightforward determination and conclusion that the 1996 amendment was a clarification of the 1964 enactment." Pet. 12. The

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[4] The same cannot be said for the Petitioners in their discussion of the decision in *Application of Sumar*, 123 F.R.D. 467 (S.D.N.Y. 1988), which Petitioners misinterpret. The Petitioners described it as "declining to apply the Federal Rules of Civil Procedure where the foreign proceeding was criminal in nature. . . ." Petition ("Pet.") 15. That statement is grossly inaccurate. The Eleventh Circuit correctly cited the case, which involved discovery for a foreign criminal proceeding, for the exact opposite rationale than the Petitioners advance. Pet. App. 10. The Eleventh Cir uit wrote that the *Sumar* decision declined "to apply the Federal Rules of Criminal Procedure where the foreign proceeding was criminal in nature." *Id.*

Petitioners aver that "[c]larifications are not subsequent enactments" and suggest that the 1996 amendment was not an amendment that carries with it the legal ramifications thereof.

The Petitioners attempt to make this unfounded argument for the first time to this Court because they know the "Last in Time" Rule is well settled and serves to eviscerate the entire foundation upon which the Petition is based. The Petitioners attempt to buttress this meritless argument with a citation to a footnote in a concurring opinion in a criminal mail fraud case. Pet. 12 (citing *United States v. Svete*, 556 F.3d 1157, 1170 (11th Cir. 2009)). The footnote does not stand for the stated proposition. *Id.*

The Eleventh Circuit's decision properly found that, even assuming arguendo, the U.S.-Switzerland MLAT and Section 1782 were inconsistent, Section 1782 was controlling because it was amended by Congress more recently than the U.S.-Switzerland MLAT. Pet. App. 8; *Whitney v. Robertson*, 124 U.S. 190, 194 (1888). Specifically, Section 1782 was amended in 1996 and the U.S.-Switzerland MLAT went into force on January 23, 1977. Pet. App. 8.

It is also important to note that the 1996 amendment to Section 1782 added the words "including criminal investigations conducted before formal accusation" after the reference to "foreign or international tribunal." Pet. App. 60. This amendment evidences congressional intent that the United States

permit interested persons, including criminal defendants, to utilize Section 1782 even prior to formal accusations having been made. *Id.* Had Congress intended to limit individuals from utilizing Section 1782 or force individuals to seek discovery via the U.S.-Switzerland MLAT, Congress could have done so. *Id.* Instead, consistent with Article 38 of the U.S.-Switzerland MLAT, Congress intentionally broadened, not narrowed, the application of Section 1782.

Accordingly, the Eleventh Circuit properly found that Section 1782 controlled over the U.S.-Switzerland MLAT.

CONCLUSION

For the aforementioned reasons, the Petitioners failed to present any compelling reasons for this Court to grant their Petition for Writ of Certiorari. The rulings of the United States District Court for the Middle District of Florida and the United States Court of Appeals for the Eleventh Circuit awarding the identical discovery to Respondent Weber for use in the civil Cypriot Action require that the Petition for Writ of Certiorari be denied. Moreover, the lower courts properly applied 28 U.S.C. Section 1782, appropriately disregarded the application of the U.S.-Switzerland MLAT under the facts in this case, and correctly followed this Court's decision in *Intel Corp. v. Advanced Micro Devices, Inc.*, *supra*. Therefore Respondent Galina Weber respectfully requests this

Court enter an Order denying the Petition for Writ of Certiorari.

June 9, 2009

Respectfully submitted,

LAWRENCE J. HAMILTON II
Counsel of Record
DANIEL K. BEAN
ANDREW STEIF
HOLLAND & KNIGHT LLP
50 N. Laura Street, Suite 3900
Jacksonville, Florida 32202
Telephone: (904) 353-2000

Counsel for Respondent,
Galina Weber

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

GALINA WEBER,	Jacksonville, Florida
Petitioner,	Case No. 3:07-mc-27-J-32MCR
vs.	October 27, 2008
LAZAR FINKER, et al.,	8:30 a.m.
Respondents.	Courtroom No. 10D

SHOW CAUSE HEARING
BEFORE THE HONORABLE
TIMOTHY J. CORRIGAN
UNITED STATES DISTRICT JUDGE

COURT REPORTER:

Shannon M. Bishop, RMR, CRR
221 North Hogan, #150
Jacksonville, Florida 32202
Telephone: (904) 549-1307 Fax: (904) 301-6844
dsmabishop@yahoo.com

(Proceedings reported by microprocessor stenography; transcript produced by computer.)

PETITIONER'S COUNSEL:

DANIEL K. BEAN, ESQ.
LAWRENCE J. HAMILTON, II
Holland & Knight
50 North Laura Street, Suite 3900
Jacksonville, Florida 32202

RESPONDENTS' COUNSEL:

CHARLES B. LEMBCKE, ESQ.
Law Office of Charles B. Lembcke
1300 Riverplace Boulevard, Suite 605
Jacksonville, Florida 32207

* * *

[18] some of these company documents, we believe, all fall within those -- within the parameters of our request for production.

Perhaps the deposition of one of the most knowledgeable persons regarding production of documents might be in order, or, as we had suggested, we file a written paper that more fully flushes out our position.

But, also, that the respondents, as part of the sanction – because of the amounts of money we're talking about, a sanction really isn't going to mean anything. it's – the actual full presence or attendance at a hearing, in which some questions may be asked to determine exactly what they did to comply with the court's order, would probably be the better sanction, from the petitioner's standpoint.

Thank you.

THE COURT: Mr. Lembcke, let me just -- and I want to do this briefly. I don't want to spend a lot of time on it. But I – you know, the last thing in the world I want to do is to sanction anybody, ever. And, fortunately, very, very rarely it comes up.

But let me – let me just – and part of what I – I know you say, you know, you're not hiding anything. And I certainly have no reason to think you, as an officer of the court, would try to hide anything.

[19] But the – the history of this litigation just doesn't comport with an effort by your clients to be responsive to the court.

It is absolutely true that your clients – you representing them – and in your papers you say that whatever happened was my responsibility; it wasn't their responsibility. And I – you know, I'll accept that, if that's what you say.

But, you know, you're absolutely entitled to raise legal issues. But it just – in my view, when I look at this, it has every aspect of people who just don't want to produce documents, no matter what.

I mean, this – this thing was filed in May of '07. This was a chronology I put together this morning. And you will, I'm sure, correct me if I get anything wrong. It was opposed on legal grounds.

Judge Richardson, on October 11 of '07, entered an R and R because he thought I had to rule as a matter of law whether or not these legal objections were valid or not.

Probably he could have just ruled on them, but he, did it as an R and R. I looked at it. On November 30 of '07, I adopted the R and R, and it went back to him to actually determine which document should be produced.

But before he could do that, you appealed to the Eleventh Circuit in what anybody, who could look at it, [20] would say was clearly a non-appealable order. It wasn't a final order. I mean, I knew it as soon as I saw it.

Obviously, the petitioners – that was their position. And the Eleventh Circuit knew it as soon as it saw it. But it took three months.

So that – to me, that was – that was the first indication I had that – that your clients were not interested in getting an actual resolution of this; they were just interested in not producing these documents. At least that's the way I took it. Because I just couldn't understand how there could be an appeal of that order.

And so then the Eleventh Circuit, in April of '08, says, It's not an appealable order, it's not a final order. So then it comes back to Judge Richardson and he orders production of May 1st of '08.

You appeal that order. And one of your grounds was that Judge Richardson didn't have the authority to do it, when I think he clearly did. And I overruled the objections, denied the appeal, and ordered the production on June the 5th.

And then you file a motion to stay, which, you know, you were entitled to do. I didn't – I mean, I didn't really begrudge you that. And – but I didn't think that you were entitled to it.

I thought Judge Richardson had handled the matter [21] correctly. I thought that there had been enough delay in the case. I might have been more inclined to consider a stay if you had not already taken an appeal that I thought really wasn't meritorious. And so I denied the stay.

But in that order, I – I wanted to give you a chance to convince the Eleventh Circuit otherwise. Because I thought, Well, maybe I'm not looking at this right, maybe – maybe you've got something that I don't see here.

And so in my order of June the 11th, said, Well, I don't think there's a basis to stay pending appeal, but I recognize that if I – if I deny the stay outright, then it could moot the appeal.

So I delayed and I – I said that you could ask the Eleventh Circuit. Until the Eleventh Circuit ruled, I would – I would delay the – I would stay the order.

But in that order – and I want to find it – in that order – because I wanted to avoid what ended up happening – I put in big black letters, The Court orders respondent to gather the responsive documents forthwith so respondents will be prepared to produce them timely in the event the Eleventh Circuit denies the stay.

So that was June the 11th. So then the Eleventh Circuit denied the stay. And I thought, Okay. Well, five days from now, Mr. Lembcke will produce the

documents. But you sought rehearing on the denial of the stay.

[22] Never heard of that before, but, you know, then Mr. Bean moved for sanctions. And I said, Well, as long as it's up in the Eleventh Circuit – and, if they're going to consider it, I guess I'll wait to see what they do.

And in your response to that – in your response to Mr. Bean's motion for sanctions, you – you said, Should the Eleventh Circuit panel deny respondents' petition for rehearing, then the order denying the same will become final. And then – I'm skipping a sentence.

And you say, Respondents have represented they will provide production within five days of receipt of the order denying petition.

That was the order you sent to me.

I said, you know, I'm not – I really think this thing has gotten dragged out, but if Mr. Lembcke says he will produce them within five days of the order denying the petition for rehearing, on that basis, I'm going to deny that, because I'm relying upon that representation.

And then as I – and, again, these are notes I made. You correct me if I'm wrong. The Eleventh Circuit denied that reconsideration, on September 17th of 2008.

I assumed that full production would be made without any question by September 22nd, 2008 – or September 23rd. Mr. Lembcke wrote you – I think it should have been September 22nd.

[23] Mr. Bean wrote you on September 23rd, basically saying, Where are the documents? You made it – what's called a partial production on September 30th of '08. And I couldn't understand why there should be anything partial about a production that, by order of June 11th of '08, you were required to have those documents ready to be produced on five days' notice.

So I couldn't understand why that should be a partial production, in any event. And it was late. It was about a week late from when you represented you would do it, and after having gotten me to deny a motion for sanctions based upon representations they would be produced five days after the denial of the stay, or denial of reconsideration of the stay.

And then I guess the Eleventh Circuit is set for oral argument. So you decided, well, that gives you another basis for delay. And you asked the Eleventh Circuit for relief.

In my mind, it gave you no basis to delay. You know, I don't know why the Eleventh Circuit set it, but they twice – not once, but twice denied your motion for stay.

And so, in my mind, you had every obligation to produce it when you said you would. And then, you

know, you – you write Mr. Bean a letter – and I'm going to get this letter. I'm just telling you how this is looking to [24] me. You know, you may have a different view of it.

But October 6th of 2008 – so now – now you – you should have – under your representations, you should have produced everything – under the June 11th order, you should have had everything ready to produce months ago.

And under the denial of the motion for rehearing of the stay and your representation you would produce everything five days later, it should have all been produced by September 22nd of '08.

Here's October 6, 2008. You write Mr. Bean, Thank you for your letter of October the 3rd. While I had hoped to have the remaining production by the end of the week – again, I have no idea why that would be an issue, given my previous orders – you go on to talk about your trial with Judge Adams and so forth, which I know went away, but maybe this time it hadn't – I don't know when this was.

You know, and then you – you feel the need to add in this letter, You can rest assured that my client in this criminal case has received only that discovery allowed under the Federal Rules of Criminal Procedure. And it is a pittance of the discovery you have sought in the above-styled case.

I don't consider that snide remark appropriate, given where you were in this case. I don't understand

that. And now we're here – you know, another production – a [25] partial production was made after I issued the order to show cause.

And I guess you decided, Okay, I've finally maybe run out of chances here. Maybe I pushed him a little too far. Maybe no more Mr. Nice Guy, so I guess I better – I guess I better go ahead and comply.

And now we're here today. And that's the way I see the case. And so when – now we have an issue whether – my main concern all along has not been sanctions.

My main concern was that it was found by Judge Richardson, and affirmed by me, that the petitioners were entitled to a certain subset of documents. And I noticed in re-reading Judge Richardson's order – again, I thought he was very careful.

He found many of their requests overbroad. He tried to narrow them. I thought he was very careful to try to – to give appropriate discovery and – and, clearly – I know you had a legal argument that they weren't entitled to anything. That argument was rejected. It was rejected by him and it was rejected by me.

And the – and so then the scope of the production, I thought – I thought was – you know, I don't – I didn't know nearly as much about it as he did, but he seemed, to me, to be doing a very conscientious job of trying to narrow the issue, narrow the production.

[26] And, clearly, his order, in my mind, was neither erroneous or contrary to law. And so that's what should have been produced.

And so now I'm being told here today that even after all this lateness, and all this back-and-forth and so forth, that – I'm being told today that a full production has not been made.

Now, I have no idea – I don't have any slightest idea whether Mr. Bean is right or whether he's wrong. And I hear what you say. And you're saying you can't get blood out of a turnip and all that.

The problem I have, Mr. Lembcke, is I don't feel like your clients have much credibility right now, given the history of this case. And so that's where we are.

And that affects my thinking both about the scope of the production and what – and what links I should allow the petitioners to go to try to ensure that there has been complete production. And it also, frankly, applies to whatever sanctions are available to me.

And so, you know, I – I regret being here at 8:30 on a Monday morning to talk about sanctions involving two law firms and lawyers that I respect, but that's how I see it.

And – and so I want to give you – and I – you know, I know you could talk for an hour about this. But I

* * *

[41] MR. BEAN: Thank you, Your Honor.

MR. LEMBCKE: Thank you.

COURT SECURITY OFFICER: All rise.

(The proceedings concluded at 9:25 a.m.)

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